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FILE: LIN 02 200 50483 Office: NEBRASKA SERVICE CENTER Date: MAR 30 2004


IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a sportswear manufacturer. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$12.50

per hour for a forty-hour workweek, which equates to \$26,000.00 per annum.

With its initial petition, counsel for the petitioner provided a copy of its 2001 federal income tax return and copies of bank statements for January, May, June, July, August, and November of 2001. The director found that none of these documents established the petitioner's ability to pay the proffered wage as of the priority date. On August 14, 2002, the director issued a request for additional evidence requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments, audited financial statements, or copies of annual reports.¹ In addition, the director requested evidence of the petitioner's monthly recurring household expenses.

In response to the director's request, counsel submitted a listing of the petitioner's monthly expenses and supporting documentation, as well as copies of the petitioner's checking account statements for the period from April to July 2002. After reviewing this additional information, the director issued a second request for evidence on November 27, 2002. In his request, the director stated that the income figures as set forth on the petitioner's 2001 tax return did not establish the petitioner's ability to pay the proffered wage at the establishment of the priority date. Additionally, the director advised that the bank statements contained in the record were incomplete. As a result, the director made a specific request for financial documentation that would support the petitioner's claim that it had ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains permanent legal residence. The director also requested copies of the beneficiary's W-2 forms if the petitioner employed the beneficiary in 2001.

Counsel submitted the following documents in response to the director's second request for evidence:

- (1) a copy of Schedule C from the petitioner's 2001 tax return;
- (2) a partial copy of the petitioner's personnel records;

¹ The director also requested documentary evidence of the beneficiary's exact legal name. As requested, counsel for the petitioner submitted appropriate evidence, and this issue was resolved to the director's satisfaction. Therefore, there is no need to discuss this issue within the scope of this decision.

- (3) an unaudited profit and loss statement; and
- (4) additional copies of the petitioner's bank statements for May, June, July, August, October and November 2001, and March, April, June, July, August, and September 2002.

The director concluded that, notwithstanding the additional documentation provided, the record still lacked sufficient evidence to establish that the petitioner had the ability to pay the proffered wage during the relevant time period. Consequently, the director issued a denial on February 11, 2003.

On appeal, counsel for the petitioner submits a statement and additional evidence.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage. Specifically, he determined that the petitioner's income was substantially less than its recurring expenses and the proffered wage. Consequently, the petition was denied.

On appeal, counsel asserts that the petitioner did in fact have the ability to pay the proffered wage at the time of the priority date and continuing until the beneficiary obtains lawful permanent residence. In support of this assertion, counsel states that the ending balances demonstrated in the petitioner's bank statements establish the ability to pay, and additionally, the petitioner's gross income combined with the amount it paid in wages clearly establishes that the petitioner's financial position was solid during the relevant period. Moreover, counsel introduces new evidence regarding the petitioner's rental income.

Before addressing the points raised by counsel on appeal, the AAO will review the record and the actions of the director.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y.

1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

A review of the petitioner's 2001 federal tax return reconfirms the director's finding of insufficient funds to pay the proffered wage. Specifically, the petitioner's adjusted gross income is \$19,745, which is not adequate to establish its ability to pay the proposed salary of \$26,000 per annum. The petitioner's net profit of \$21,415, as set forth on Schedule C, is equally deficient. The record, therefore, lacks credible evidence that would establish the ability of the petitioner to pay the proffered wage during the relevant period.

Additionally, the petitioner's monthly recurring expenses are much higher than its income. The director correctly determined that the petitioner's annual expenses, combined with the proffered salary, substantially exceeded the petitioner's income. The record contains evidence that the petitioner has the following monthly expenses:

- (1) Installment loan of \$2,423;
- (2) Installment loan of \$1,713;
- (3) Automobile payment of \$345.26; and
- (4) Household expenses ranging between \$2,000-\$3,000

The total of these combined expenses is \$6,481.26 per month, or \$77,775.12 per year.² Combined with the beneficiary's proposed salary of \$26,000, the petitioner's total expenses significantly exceed the petitioner's income.

Notwithstanding this conclusion, counsel contends that the additional financial evidence in the record, when considered in conjunction with the petitioner's income, clearly establishes the petitioner's ability to pay the proffered wage. Specifically, counsel alleges that the bank statements and profit and loss statement show that the petitioner's financial condition is much more profitable than reflected by its tax return. The office does not agree with counsel's contention.

² The petitioner states that its household expenses range from \$2,000 to \$3,000 per month. The director, and the AAO, both use the lower estimated amount of \$2,000 in determining the petitioner's monthly expenses.

Although the petitioner submitted copies of its bank statements for 2001 and 2002 to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that these statements somehow represent additional funds beyond those of the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Bank statements, without more, are unreliable indicators of ability to pay, as they do not identify funds that are already obligated for other purposes. In addition, the petitioner's banking records, as noted by the director, are incomplete, and therefore do not present a clear picture of the petitioner's overall banking history.³

The petitioner also submits a profit and loss statement, which it alleges is signed by the petitioner's accountant. The document, however, is unacceptable as proof of the petitioner's ability to pay the proffered wage during the relevant period. As clearly stated on the document, the financial information contained therein has not been audited or reviewed. Additionally, there is nothing that indicates the signatory's title or credentials. This document, and unaudited financial statements in general, are of little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Counsel also relies on a partial copy of its personnel records accompanied by a highlighted copy of Schedule C from the petitioner's 2001 tax return. This documentary evidence has little probative value in determining the petitioner's financial ability to pay the proposed salary. First, the personnel records do not show that the petitioner employed the beneficiary. Although Schedule C shows that wages in the amount of \$105,935 were paid to employees in 2001, none of these wages were paid to the beneficiary. Therefore, the petitioner is required to prove that it had an additional

³ Although complete banking records were requested by the director, the petitioner failed to submit its statements for April 2001, January, February, May, October and November 2002, and provided only the last page of the statements ending in February and December 2001.

\$26,000 to pay to the beneficiary. Since there is no claim that the beneficiary will be replacing an employee currently on the payroll, the petitioner must prove that it had and continues to have the financial ability to pay the beneficiary the proffered wage in addition to the wages of its other employees.

Second, the petitioner is requesting consideration of depreciation and the amount of wages paid by the petitioner as set forth on Schedule C, and therefore is encouraging the office to look at the gross income of the petitioner after adding back these amounts. This position is not warranted. In *K.C.P. Food Co., Inc.*, 623 F. Supp at 1084, the court held that CIS (formerly the Service or INS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Additionally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. Furthermore, the reliance on these figures by counsel in concluding that the petitioner has the ability to pay is misdirected. Specifically, wages paid to employees are generally considered unavailable to pay the proffered wage, because they essentially have already been expended. Also, the addition of depreciation costs to income is but one of many steps that must occur to complete a cash flow calculation. Therefore, relying on the addition of only one step in the process, without presenting an overall statement of cash flows, is not acceptable. In conclusion, merely examining the petitioner's gross income after re-adding depreciation and wages paid without accounting for any expenses is erroneous.

Since these figures do not represent additional assets that may be convertible to cash or cash equivalents, the director correctly refused to consider them. Therefore, neither the personnel records nor the figures highlighted on Schedule C establish the petitioner's ability to pay the proffered wage.

A review of the evidence in the record warrants a conclusion that the director's decision was correct. The AAO will now address the petitioner's newly-submitted evidence.

On appeal, the petitioner submits evidence of property ownership and copies of lease agreements for four rental units. Counsel for the petitioner asserts that the rental income generated by the lease of

these units supplements the petitioner's income, thereby establishing its ability to pay the proffered wage.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the Board of Immigration Appeals (BIA) stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the petitioner was put on notice of the need for evidence demonstrating the petitioner's ability to pay the proffered wage by the director's requests for evidence issued on August 14, 2002 and November 27, 2002. Although the director did not specifically mention the newly-submitted documents by name or category, the request for evidence was sufficiently detailed to put the petitioner on notice of the types of evidence needed. The director requested evidence of the petitioner's ability to pay the proffered wage, and evidence of additional income received by the petitioner from the rental units clearly falls into this category.

Counsel makes no claim that the newly submitted evidence was unavailable previously. As a result, the appeal will be adjudicated based on the record of proceeding before the director.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The evidence in the record confirms that the petitioner's income is substantially less than the combined totals of its recurring expenses and the proffered wage, as well as significantly less than both of these figures individually. The petitioner, therefore, has not met its burden.

ORDER: The appeal is dismissed.